DISPARAGEMENT OF PROPERTY.

Under this head it is intended to discuss the topics which are often considered under the title—Slander of Property. The latter phrase is objectionable. Its use has led to confusion, and especially to attempts to apply false analogies.[1]

The term "property" as used here, has a very broad meaning.

"The property may be either real or personal, corporeal or incorporeal; and the plaintiff's interest therein may be either in possession or reversion. It need not be even a vested interest, so long as it is anything that is saleable or that has a market value. The word 'property' includes a patent right, copyright, the right to use a trade mark or trade name."[2]

Disparagement of property may be divided into two main classes:

(1) Disparagement of Title (or interest).

(2) Disparagement of Quality.

We take first Disparagement of Title.

This topic, may, in turn, be divided into two classes:

(1) Where defendant is a stranger; *i. e.,* one who does not assert any right or interest in himself with respect to the property in question.

(2) Where defendant is a rival claimant: *i. e.,* one who asserts some right or interest of his own (or his principal) with reference to the property in question; which right or interest is adverse to that claimed by the plaintiff.

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[1] "'Disparagement' is the term used in most of the later cases, and, for this reason and because it both dissociates the act which constitutes it from acts of defamation proper and does not suggest either oral or documentary expression as an element in its composition, it is adopted in the text." Bower, Code of the Law of Actionable Defamation, 242 note (*b*).

As to the confusion which has resulted from the use of the expression "slander of title," see Bower, 240 note (*y*), 441.

[2] Odgers, Libel and Slander (5th ed.) 81. Compare Bower, Code of the Law of Actionable Defamation, 241, note (*z*).

It would seem that an equitable right, *i. e.,* a right enforceable by a court of equity though not by a court of law, must be "property," the disparagement of which would be actionable. If the majority opinion in Hurley *v.* Donovan (1902) 182 Mass. 64, is to be understood as affirming the contrary view, it can hardly be sustained.

To maintain an action for disparagement of property, it is not enough for a plaintiff to show that he had a "property" interest within the above wide definition; and that his interest has been damaged by the defendant. He must also show that the method by which the damage was inflicted comes within the legal definition of "disparagement." As to the meaning of the latter term, see *post,* quotation from Bower, 242 (2); and comments thereon.

There are three principal sources of confusion:

(1) Failure to distinguish between the requisites of an action against a stranger and the requisites of an action against a rival claimant.

(2) The application of false analogies. Or, more specifically, the failure to realize that the action for disparagement of property has a place of its own in the law; and is not a mere branch, or special variety, of the action for defamation of personal reputation, or of the action for deceit.

(3) The use of ambiguous and misleading expressions; such as "malice" and "presumed".

It is proposed to first state briefly the three "common" propositions which are generally admitted to be essential to the maintenance of an action against both stranger and rival claimant; next to consider what, if any, other requisites are common to both actions; and then to consider separately what are the requisites (in addition to the above "common" propositions) to the liability of a stranger, and what are the additional requisites to the liability of a rival claimant.

The law makes it more difficult to maintain an action against a rival claimant than against a stranger. But there are at least three common requisites to an action against either.

Plaintiff must prove, both as against a stranger and as against a rival claimant, the three following propositions:[3]

(1) Defendant communicated to some person other than the plaintiff a statement disparaging plaintiff's title, right or interest in the property.

Communicated is preferred to the more common term *published.* The question what will constitute communication to a third person is analogous to the question what will constitute publication in cases of defamation of reputation.[4]

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[3]Thompson *v.* White (1886) 70 Cal. 135, was an action for "slander of title." The evidence showed that the existence of the title alleged to have been slandered was in dispute in a prior action between the present parties brought for the purpose of determining their rights, and that this prior action was still pending. A non-suit was ordered.

It is supposed that, while the pendency of the prior action would be good matter of defence to be set up under an affirmative plea, yet that it was not incumbent on the plaintiff in the first instance to allege and prove the non-existence, or non-pendency, of a prior action.

[4]"A slander of title to the owner alone cannot give rise to a cause of action, any more than actionable words uttered in the presence of the person slandered only." Title Ins. Co. of N. Y. *v.* Hawes (1912) 135 N. Y. Supp. 608, 610.

Can an action be maintained where the communication is made by conduct: *i. e.*, by acts which do not include the use of oral or written language?

An action may be maintained for defamation of reputation, where the defamatory matter is communicated by "non-verbal signs." The principle of those cases seems to us applicable here. A recent decision, however, appears to be adverse to our view.[5]

Disparaging plaintiff's title, right or interest in the property.

"Disparagement means and includes any publication of matter, the meaning and effect of which is to deny or cast doubts upon the existence or validity" of the plaintiff's "right, claim, title or interest to, or in," the property in question.[6]

(2) Defendant's statement was not true in fact.

The expression *not true in fact* is preferable to *false*. The latter term might sometimes be taken to mean not only that the statement was not true in fact, but also that the defendant knew it to be untrue.

If the statements were true in fact, "no action will lie, however malicious the defendant's intention might be."[7]

In an action for defamation of reputation the burden is on the defendant to prove the truth of the charge. The law arbitrarily assumes that the plaintiff's character is good until the contrary is proved. But there is no similar "presumption" in favor of the validity of a title to property claimed by plaintiff and impugned by

[5]Rhoades *v.* Bugg (1910) 148 Mo. App. 707, was an action for "slander of title". Plaintiff alleged, *inter alia*, that defendant (knowing that he had no title) drove stakes on plaintiff's land, in order to make it understood that he claimed title; plaintiff also alleged that defendant verbally disputed plaintiff's title. Plaintiff proved the driving of the stakes, but failed to prove verbal statements. In the lower court, plaintiff was allowed to recover on account of defendant's conduct. But this decision was reversed in the higher court and the case was remanded. The higher court inclined to the opinion that there could be no action for slander of title except by words spoken or written; and held that, even if there could be an action on the case to recover for harm done by defendant's conduct (a point which was not decided), yet such an action had not been brought in this instance. It seems, however, that the allegations of the declaration might have been held divisible; and that thus a recovery founded on conduct alone might have been permitted.

[6]See Bower, Code, 242. Plaintiff's property interests may be seriously affected by wrongful conduct of defendant, which would not constitute "disparagement". If, for instance, the defendant sells merchandise or carries on business under such a name, mark or description as to mislead the public into believing that the merchandise or business is that of the plaintiff, he may thereby commit an actionable wrong against the plaintiff. But he has not "disparaged" plaintiff's title within the legal meaning of that term.

[7]Maule, *J.*, in Pater *v.* Baker (1847) 3 C. B. 831, 868.

defendant. In an action for disparagement of title the burden is on plaintiff to prove the untruth of defendant's statement, and that burden is not lightened by any artificial rule of law.

(3) Actual damage was caused to plaintiff by defendant's statement.

The meaning and effect of this proposition will be considered later, after discussing in detail the requisites to the liability of strangers and rival claimants.

Is there, in addition to the above three propositions, another "common" requisite to the liability of both strangers and rival claimants? Is it necessary for the plaintiff to prove also that the disparaging statement was made under such circumstances that it was not unlikely to be acted upon? [8]

The question whether an action for disparagement of title should fail for want of such proof can hardly ever arise. The undisputed testimony generally shows beyond doubt that the defendant expected his statement to be acted upon; indeed that he desired it to be acted upon and made it for that express purpose (though such desire may not have proceeded from a motive of hostility to the plaintiff). The desire is never lacking when the defendant is a rival claimant. When defendant is a stranger, there may be exceptional cases where he neither desired nor expected his statement to be acted upon. But the instances must be extremely rare where he ought not, as a reasonable man, to have foreseen the probability that it would be acted upon. There seems no practical injustice in establishing, even as to a stranger, a hard and fast rule of law, that one who publishes a statement impugning title does

[8] As to analogies: The above proof is not required in an action for defamation of reputation.

In estoppel, Mr. Ewart thinks that something like this is necessary, Ewart, Estoppel, 158; but the authorities are not unanimous. See *contra*, Horn *v.* Cole (1868) 51 N. H. 287; commented upon in Ewart, 158.

In deceit, such proof, or something still stronger, is requisite. There are three theories, each having some support from authority:

1. Defendant must have desired that his representation should be acted upon. See Clerk and Lindsell, Torts (2nd ed.) 467; Salmond, Torts (1st ed.) 423; Kerr, Fraud (4th ed.) 63.
2. It is enough if defendant, though not desiring it, expected that his representation would be acted upon.
3. It is enough if defendant, though neither desiring nor expecting that his representation would be acted upon, ought, as a reasonable man, to have foreseen that it was likely to be acted upon.

See Pollock's Draft of Indian Civil Wrongs Bill § 40; Pollock, Torts (6th ed.) App., 603; Terry, Leading Principles of Anglo-American Law, 230, 231.

If any of these three views as to actions of deceit should be adopted in actions for disparagement of property, it would probably be the third.

so at the peril of its being acted upon. And, to anticipate a little, we think that the same rule may well be applied to disparagement of quality. The probability that disparagement of quality will be acted upon may be a little less than the probability in case of disparagement of title. But still, in the great majority of instances of disparagement of quality, the speaker ought to regard it as not unlikely that his statement will influence the hearers to the damage of the plaintiff. In almost all the reported actions for disparagement of quality, the defendant is either a trade rival who not only expected but desired that his statement should be acted upon, or a newspaper proprietor who ought to have foreseen that the publication was not unlikely to influence the conduct of readers.

Assume, however, that we are mistaken in supposing that the courts will adopt a hard and fast rule of law of the import above suggested. Suppose that the courts require the plaintiff to prove that the statement was made under such circumstances that it was not unlikely to be acted upon. This requirement will very seldom bring about a different result from what would happen under the arbitrary rule of law first supposed. For in almost every case the undisputed testimony clearly establishes the required fact; and this is probably the reason why the question as to the existence of a rule of law has not been made a subject of discussion in the reported cases.

Now especially as to the requisites of an action against a stranger.

What, if anything, must be proved in addition to the three "common" propositions above stated, which are essential both to an action against a stranger and to an action against a rival claimant?

There are two points as to which, if there is a conflict of testimony in regard to them, the burden is on the plaintiff to make the scales tip in his favor.

First: That the defendant was not acting in the character of a rival claimant; that, in disputing the validity of the plaintiff's title, he did not assert the existence of a claim or interest in himself.[9]

Second: That there was no such special interest (to be pro-

[9] It is not enough that the defendant was in fact a rival claimant. To entitle himself to the privilege of a rival claimant, and thus put himself in a better position than that of a mere stranger, it must appear that he professed to be asserting a right in himself when he disputed the title of the plaintiff. Earl of Northumberland *v.* Byrt (1606) Cro. Jac. 163; and see Pennyman *v.* Rabanks (1596) Cro. Eliz. 427.

tected) on the part of the addressee as would confer upon the defendant a *prima facie* immunity, analogous to conditional privilege in an action for defamation of reputation.

As to this second point, there is a dearth of direct authority in regard to actions for disparagement of property.[10]

Ordinarily, it is not necessary for the plaintiff, in the first instance, to offer evidence for "the direct and special object" of proving either of the above negative propositions. Such evidence would not generally be required to make out a *prima facie* case for the plaintiff and avoid a nonsuit. But if, after the testimony is all in, there is a conflict on either of these points, then we think that the plaintiff will fail, unless the jury find, as matter of fact, that these propositions are established by a preponderance of testimony (on a balance of probabilities).[11]

Are there any other requisites to establishing the liability of a stranger?

From general language used by some judges and text-writers, it might be supposed necessary to prove one or more of the following propositions:

1. That defendant, in making the statement, intended to cause damage to the plaintiff.[12]

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[10]In Kendall *v.* Stone (N. Y. 1848) 2 Sandf. 269, the charge to the jury was, in effect, that the law affords *prima facie* protection to a communication honestly made with the sole view of cautioning a "friend or acquaintance" against purchasing property, the title to which the informant really believes to be imperfect. The plaintiff, having obtained a verdict, was in no position to carry up an exception to this instruction. So far as the defendant was concerned, it was enough to say that the charge was at least sufficiently favorable to him. Hence the seeming approval of this charge by Vanderpoel, *J.*, p. 284 may be regarded as a mere *dictum.*

[11]The above view as to the practical burden of proof differs from that held in the law of defamation. There the burden is on the defendant to prove that the "occasion" was *prima facie* privileged. Here, the burden is, practically, upon the plaintiff to prove that the "occasion" was not *prima facie* privileged. Odgers and Bower both say that, in an action for disparagement of property the burden is on the plaintiff to prove that the statement was made "maliciously"; and they both appear to regard "maliciously" as equivalent to the expression "without lawful occasion". See Bower, Code, 244-246; Odgers, Libel and Slander (5th ed.) 93, 94; especially note on page 94.

If, in any case, there is held to be a *prima facie* immunity on the ground of an interest to be protected, either an interest in the defendant or in the addressee, then the question will arise: what will rebut or destroy this *prima facie* protection. This question is discussed *post* under "Rival Claimant". It is there said that the *prima facie* immunity is defeated if the plaintiff proves: either that the defendant did not believe his statement, or that the defendant made it from a wrong motive.

[12]That "design to injure" is not essential to liability, see Cooper, Law of Defamation and Verbal Injury (1st ed.) 9-11; criticising Lord President Robertson, in Paterson *v.* Welch (1893) 20 Scotch Sess. Ca. (4th series) 744, 749.

2. That defendant was actuated by some wrong motive.

3. That defendant was actuated by the special wrong motive of hostility to the plaintiff.

4. That defendant did not believe in the truth of his statement.

If we look to what has actually been decided, none of these propositions are necessary to an action against a stranger. Neither intent to harm, nor wrong motive of any kind, or want of belief are essential to his liability.[13]

How then can one account for the general statements occasionally found in opinions and text-books, which could be understood as asserting that intent to harm, wrong motive or bad faith are invariable requisites?

These statements are largely attributable to two sources of error. One is: Confounding two classes of persons, and thus applying to actions against strangers principles which are properly applicable only to actions against rival claimants. The other is: The use of an ambiguous and misleading term ("malice").

One explanation is, that the writer was thinking only of the essentials to an action against a rival claimant, and stated those requisites as if they were applicable to *all* actions for disparagement; not only actions against rival claimants but also against strangers. Suits against rival claimants are much more numerous than suits against strangers; and it is not uncommon to discuss the subject as if the former class were the only species of actions for disparagement known to the law. Able writers, who are perfectly aware of the distinction between the two classes, often use language open to misapprehension in this respect.

As to general expressions in text-books apparently asserting the universal necessity of proving wrong intent or bad motive, it will often be found that the author, although using no qualifying word in what seem to be his crucial sentences, has nevertheless inserted passages in another part of his discussion which show that he had the proper distinctions in mind.

If one analyzes the reported decisions where judges have used very sweeping language as to the necessity of proving wrong intent or bad motive in order to sustain an action for disparagement of property, it will generally be found that the defendant was in fact a rival claimant (or a public officer, acting under a sense

[13] Pennyman *v.* Rabanks (1596) Cro. Eliz. 427; Earl of Northumberland *v.* Byrt (1606) Cro. Jac. 163; Mildmay *v.* Standish (1582) 1 Coke Rep. 175, 177*a*-177*b*; Rowe *v.* Roach (1813) 1 M. & S. 304.

of duty, as in *Pater* v. *Baker supra*); and not a stranger, not an officious intermeddler.

Take, for example, the case of *Halsey* v. *Brotherhood.*[14] Pollock cites this decision as an authority for the position that, in slander of title, "the wrong is a 'malicious' one in the only proper sense of the word, that is, absence of good faith is an essential condition of liability."[15] So Dr. Kenny, in his Cases on Torts, while placing this case under "Slander of Title," prefixes the following head note: "Actual malice is essential to this tort."[16] But the question actually before the court in *Halsey* v. *Brotherhood*, did not relate to the liability of a stranger, but to that of a rival claimant. The defendant was the owner of a patent, and had stated that plaintiff was selling articles which were an infringement of defendant's patent. The sweeping language of Jessel, *M. R.*,[17] as to the essential conditions of liability must be construed as applying only to cases of this class. This is distinctly brought out in the opinion of Coleridge, *C. J.*, in the Court of Appeals. (The italics are ours.)

"It seems to be clear law that in an action in the high court in the nature of slander of title, *where the defendant has property of his own in defense of which the supposed slander of the plaintiff's title is uttered*, it is not enough that the statement should be untrue, but there must be some evidence, * * * that the statement was not only untrue, but was made *mala fide* for the purpose of injuring the plaintiff, and not in the *bona fide* defense of the defendant's own property. * * *"[18]

So in *Walkley* v. *Bostwick*, Cooley, *C. J.*, said[19] that the action for slander of title "is grounded on malice." But here again the general language should be interpreted as applying only to cases of the class then before the court, *viz.*, an action against a rival claimant and not against a stranger. And when Judge Cooley, in his work on Torts[20] uses similar language, it is fair to suppose that he was thinking only of cases like *Walkley* v. *Bostwick*.[21]

[14] (1880) L. R. 15 Ch. Div. 514, aff. (1881) L. R. 19 Ch. Div. 386.

[15] Pollock, Torts (6th ed.) 301-302.

[16] Kenny, Cases on Torts, 506.

[17] L. R. 15 Ch. Div. 514, 518.

[18] L. R. 19 Ch. Div. 386, 388.

[19] (1882) 49 Mich. 374, 376.

[20] (2nd ed.) 260, note 3.

[21] In Dodge *v.* Colby (N. Y. 1885) 37 Hun 515, a declaration for slander of title was held defective for failing to allege that defendant's denial of plaintiff's title was "maliciously" made. But the declaration showed that the defendant claimed to be interested as owner. See also Hopkins *v.* Drowne (1898) 21 R. I. 20; another case of a rival claimant.

Again in *Brook* v. *Rawl*,[22] the court held that the defendant was not liable merely because his statement was untrue, but that it must have been uttered *mala fide*. But the defendant in that case practically occupied the position of a rival claimant, asserting a claim of his own.[23]

One of the best recent authors, Mr. Bower, enumerates "malice" (that the publication "was actuated by malice") as one of four propositions essential to be proved in all actions for disparagement of property; the other requisites being the three "common" propositions heretofore stated, *viz.*, publication, untruth and damage.[24] But, in reality, his requirement of "malice" is material to be proved only in the case of a rival claimant. He, in effect, defines "malice" as any motive other than that of asserting and defending a claim made by defendant to the property, which defendant believes to be a valid claim.[25] But it is obvious that this motive of asserting one's own claim cannot exist in the case of a stranger, a non-claimant. A stranger cannot be actuated by the motive of protecting his own interest, inasmuch as he has no interest of his own to protect.

So far, then, as concerns the necessity of proving "malice" or wrong motive as against a stranger, Mr. Bower's statement comes to this: A stranger (if the other three propositions are made out) is liable upon proving merely that he *is* a stranger, and not a rival claimant; his *prima facie* liability exists irrespective of his belief or motive. Or, in other words, the presence of only one kind of motive can exonerate a defendant (if the other three propositions are established), and that one is a kind of motive which can never

[22](1849) 4 Exch. 521.

[23]Not only a rival claimant, but a public official, may receive more protection than a stranger. In Pater *v.* Baker (1847) 3 C. B. 831, the defendant was a public officer, who honestly believed it his duty to make the statement in question. In holding that the action failed for want of proof of actual malice, Wilde, *C. J.*, said (p. 855): ". . . regard must be had to the situation of the defendant. He was not a mere volunteer, impertinently and intrusively interfering with another man's concerns, having no duty or obligation of any sort imposed upon him."

[24]Bower, Code, 243, Art. 61 (3).

[25]"For the purposes of this article "malice" means any motive other than that of asserting, protecting, promoting, or defending any claim interest, or duty, either of the person who has published the disparaging matter, or of some person whom, in virtue of privity of estate or agency, he is entitled to represent, to, or in, or with reference to, the property disparaged, in the existence and validity of which claim interest or duty he in fact believed when publishing such matter, whether he so believed reasonably or unreasonably, or on grounds which would, or would not, appear adequate to a normal person." Bower, Code, 244-246, Article 61 (4).

exist in the case of a stranger. If the disparaging statement were untrue in fact and caused actual damage a stranger who made it is liable without inquiry or evidence as to his motive. Whereas if such statement were made by a rival claimant, it is necessary, in order to establish his liability, to prove, either that he did not believe in the validity of his claim, or that he was actuated by some motive other than that of defending his own interest. (If there is a controversy as to the character in which the defendant purported to be acting, and the plaintiff seeks to have him subjected to the more stringent liability imposed upon strangers, the burden is on the plaintiff to satisfy the jury that defendant, when making the statement, did not profess to be asserting a claim in his own behalf.)

In the passage from Mr. Bower, just commented upon, the use of the word "malice" is accompanied by a careful definition of the meaning attributed to that word by the learned author.

But it has not been uncommon for jurists in discussing the present topic, to use the word "malice," either without any definition of its meaning, or with an unsatisfactory explanation which can only lead to erroneous results. One of the principal causes of inaccurate phraseology and poor law in connection with this topic is to be found in the employment of this ambiguous and misleading word.[26]

This term "malice" has been the source of great confusion in the law as to defamation of reputation and also as to other topics: so much so that some excellent lawyers are inclined to avoid its use altogether.[27]

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[26] ". . . an expression . . . which has done more to confuse and obscure legal principles than perhaps all other verbiage combined; the word 'malice' and its derivatives." Mr. L. C. Krauthoff, 21 Reports of Amer. Bar Assn. 335, 338.

The word (or its derivatives) is sometimes used to denote morally wrong motive or intent; sometimes to denote an act done intentionally without legal justification or excuse, though without any moral fault; and sometimes merely to denote a defendant's knowledge of a particular fact.

As to the difficulty of determining the meaning of the term "malice" when used in connection with the present topic, see Salmond, Torts (1st ed.) 429.

[27] ". . . it is submitted that the less use we make of it the better." Pollock, Torts (6th ed.) 272.

In 14 Law Q. Rev. 132, speaking of the discussion of principles in a recent case, Sir. Frederick Pollock said: "May we hope that, so far as civil actions are concerned, it will enable us to get rid of the perplexed and perplexing word 'malice' altogether?"

In South Wales Miners' Federation *v.* Glamorgan Coal Co. L. R. (1905) App. Ca. 239, 255, Lord Lindley said: ". . . it conduces to clearness in discussing such cases as these to drop the word 'malice' altogether, and to

It has been very common to assert that malice is essential to the maintenance of an action for defamation of reputation; but at the same time to assert that it is never necessary to prove malice, because its existence is always conclusively presumed from the publication of a defamatory statement. What this really means is, that malice, is *not* an essential element to making out a *prima facie* case of defamation. The foregoing roundabout way of stating the true doctrine should be discarded. The malice there spoken of is "malice in law." Proof of the existence of malice in fact (actual malice) may be essential to rebut a particular defence; that of conditional privilege. But "malice in law" is an utterly meaningless expression, a fiction, a nonentity. The entire absurdity of this use of the word malice has been demonstrated over and over again.[28]

Unfortunately, the action for disparagement of property was formerly spoken of as an action for "slander of title;"[29] and this expression is still in common use.[30] Hence there has been a tendency to use the same phrases as to actions for disparagement of title as in actions for defamation of reputation. Thus this unhappy expression "malice" has been imported from the law of defamation into the law of disparagement of property; and its use

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substitute for it the meaning which is really intended to be conveyed by it . . ."

"If so 'slippery' a word, to borrow Lord Bowen's adjective, were eliminated from legal arguments and opinions, only good would result." Prof. Ames, 18 Harv. L. Rev. 411, 422, note 1.

[28]". . . one legal fiction was set up only to be demolished by another legal fiction. . . . The legal fiction that malice is essential to the action is destroyed by the fiction that the necessary malice will be presumed." 1, Street, Foundations of Legal Liability, 317 and note (8).

". . . these two useless fictions, the one laughing at and off-setting the other . . ." Gaynor, *J.*, in Prince *v.* Brooklyn Daily Eagle (N. Y. 1896) 16 Misc. 186, 188.

For a full discussion, see Mr. Green, in 6 Amer. L. Rev. 593, 597, 609-610; Odgers, Outline of the Law of Libel, 112-116.

See also Markby, Elements of Law (3rd ed.) § 687; Bower, Code, 271, 273, 153, note (*n*); Bower, Actionable Misrepresentations § 467; 60 Univ. of Pa. L. Rev. 461, 463, note 10.

[29]Mr. Bower points out that the word "slander", when first used in this connection, had a much wider legal meaning than at present. It was then used in the broad sense of injury or damage. Afterwards it came to signify injury done by means of defamation, either oral or written. Later still it came to be used in its present restricted meaning; as denoting only one species of defamation; *viz.*, oral defamation as distinguished from written. Bower, Code, 267-269. Compare Kenny, Cases on Torts, 502, note 1.

[30]A statute prescribing a limitation of "actions for slander" is interpreted as intended to include actions for disparagement of property. McDonald *v.* Green (1900) 176 Mass. 113.

in the latter connection has been productive of the same confusion as in the former.

It has not been unusual to say that "malice" is essential to the action for disparagement of title. But if we take "malice" in the sense of actual wrong motive, proof of "malice" can be material only in actions against rival claimants. In such actions, the defendant occupies (as we shall hereafter see) a position somewhat analogous to that of a defendant who has uttered, on a conditionally privileged occasion, language defamatory of reputation. To rebut his *prima facie* defense arising from his position as a rival claimant, it may sometimes be essential to prove that the defendant was actuated by a wrong motive (often loosely called "malice in fact"). But in an action for disparagement, when brought against a stranger, the existence of "malice in fact" is never an essential requisite to making out a *prima facie* case. When it is said that "malice is essential but that malice will always be presumed," this is merely repeating the old and absurd phraseology so often used in actions for defamation; the real meaning being that "malice" is not essential.

As an illustration of this mistaken form of expression, take the following sentence from *Ontario Industrial Loan etc. Co.* v. *Lindsey*:[30a]

"If the allegations are made by a stranger who has no right to interfere, malice is presumed * * *."

This means, that malice is not essential to an action against a stranger; and it would be better to say so directly.

Again, take the following passage from one of our best writers (the brackets are ours):

"Next, the statement must be *malicious;* if it be made in the *bona fide* assertion of the defendant's own right, real or supposed, to the property, no action lies. But whenever a man unnecessarily intermeddles with the affairs of others with which he is wholly unconcerned, [such officious interference will be deemed malicious and] he will be liable, if damage follow."[31]

Strike out the words in brackets and you have a correct statement of the law without any aid from the fiction of presumption. Instead of saying that the stranger is liable because his conduct is

[30a] (1883) 4 Ont. 473, 484.

[31] Odgers, Libel and Slander (5th ed.) 80.

deemed to be malicious, it is better to say that he is liable irrespective of motive or "malice."[32]

If we look to what has been actually decided,[33] and disregard *dicta,* it is settled law that a stranger is liable for damage caused by his statements disparaging title to property; although: (1) he did not intend harm to plaintiff; (2) he was not actuated by any wrong motive; (3) he believed his statement to be true.

Is this doctrine, which seems fully sustained by direct decisions, correct as a matter of principle;[34] and how does it agree with the law established in cases sometimes regarded as analogous?

The point now presented for consideration is not whether the law should enforce a liability for honest misstatements made upon any subject whatever, and made under any conceivable circumstances. The present inquiry is restricted to a much narrower field. It is, whether the law should hold a man liable for honest misstatements impugning his neighbor's title to property, when such statements have caused loss to his neighbor, and when the speaker had no reason, either in the shape of duty or of self-interest to say anything about the matter.

It is, of course, a hardship on a plaintiff, an innocent property owner, to have to bear his loss without compensation. But this hardship has not induced the courts to refrain from imposing upon the plaintiff two weighty burdens in making out a *prima facie* case.

1. The burden is on the plaintiff to prove that the statement was not true in fact; a burden not imposed on the plaintiff in an action for defamation of reputation.

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[32]That Mr. Odgers, of all men in the world, should use this incorrect language, illustrates the general tendency to copy phrases which are in popular use. No one has more forcibly exposed the absurdity of this employment of the word malice in stating the essentials to a *prima facie* action for defamation of reputation. This is made clear in Mr. Odgers' large treatise on Libel and Slander; but is stated still more fully in his smaller work—"An Outline of the Law of Libel" 112-116. Yet he practically introduces, and then explains away, the same objectionable word in stating the essentials to an action against a stranger for disparagement of title.

[33]See Pennyman *v.* Rabanks (1596) Cro. Eliz. 427; Earl of Northumberland *v.* Byrt (1606) Cro. Jac. 163; Mildmay *v.* Standish (1582) 1 Coke Rep. 177*a*-177*b*; Rowe *v.* Roach (1813) 1 M. & S. 304. See later, under "Disparagement of Quality", comments on the opinion of Fletcher, *J.*, in Swan *v.* Tappan (Mass. 1849) 5 Cush. 104, 111.

[34]Probably there is no general rule the application of which does not occasionally work injustice. But it may bring about just results in so large a proportion of cases as to make it expedient to adopt it as an unvarying rule.

2. The burden is also on the plaintiff to prove that actual damage was caused to him by the statement; a burden not imposed on the plaintiff in defamation as to written libelous charges nor as to oral charges which fall within the class of words actionable *per se.*

Assume now that the plaintiff has proved the two above propositions; and that the defendant does not claim to have been acting under a duty or in the exercise of a special privilege. Then, and not till then, the question arises, whether the defendant ought to be allowed to escape on the plea of his moral innocence.

The defendant may have honestly believed in the truth of his statement. But "however honest his state of mind," he has, by a statement not true in fact, influenced the conduct of other persons so that a loss resulted to the plaintiff. The real issue is, "who should bear the loss;" the innocent plaintiff; or the defendant who was under no obligation (had no motive of either duty or self-interest) to make any statement at all upon the subject. Who should run the risk that the defendant's statement may turn out to be untrue in fact, and that it may cause damage to the plaintiff? If a defendant, who is not acting under any duty or privilege, wishes to make a statement impugning his neighbor's title, is it not right for the law to say that "he must have accurate knowledge at his peril, or refrain from talking about it?"[35]

We shall hereafter see that greater liberty of speech is allowed to a rival claimant, who asserts his own title and thus disparages the plaintiff's title. But "the law makes no allowance for the slander of strangers" (*i. e.*, for disparaging statements made by mere strangers).[36] *"Immiscet se rei alienae, nihil ad se pertinenti."*[37]

Does the establishment of liability in this class of cases (statements by strangers disparaging title to property) necessarily carry with it the recognition of a similar stringent liability in a much wider class of cases where great injustice would frequently result from its enforcement? Does it follow that a man is to be called to account for all idle words mistakenly spoken as to indifferent subjects? Is he liable for any honest statement upon apparently trivial matters, whenever the statement turns out to be untrue and damage results in some unusual manner? Would not the imposi-

[35]See Prof. Williston on "Liability for Honest Misrepresentation" 24 Harv. L. Rev. 415, 426, 434-5.

[36]Lord Ellenborough, *C. J.*, in Rowe *v.* Roach (1813) 1 M. & S. 304, 310.

[37]Jenkins, Eight Centuries of Reports. 247, Case XXXVI.

tion of liability under such circumstances be too great a restriction on freedom of human intercourse?[38]

Our present case (disparagement of title to property) is sharply differentiated from the cases just supposed. Here we are dealing with a statement on a matter of the greatest importance, *viz.*, the title to property. Here too, a misstatement is extremely likely to result in serious loss. The allowance of an action where substantial interests are involved cannot necessitate the allowance of a remedy in the hypothetical cases above supposed.[39]

How does the settled doctrine as to the absolute liability of a stranger for disparagement of title compare with the law established in other cases sometimes regarded as in some respects analogous?

It accords with the rule as to charges which are in their nature defamatory of reputation. The law of defamation

"is not a law requiring care and caution in greater or less degree, but a law of absolute responsibility qualified by absolute exceptions * * *."[40] "Exceptions excepted, a man acts at his peril in making defamatory communications."[41] "* * * the whole law of defamation is inconsistent with any application of the law of negligence to either spoken or written words."[42]

One who, on an unprivileged occasion publishes a defamatory statement in good faith, with reasonable belief in its truth, is liable, if in fact the statement was untrue.[43]

If, in the examination of alleged analogies, we now pass to the consideration of misstatements other than those defamatory of reputation, we shall find doctrines which, at first view, seem wholly inconsistent with each other.

In an action for deceit, under a declaration containing the usual allegation of conscious falsity, it was held by the House

[38]See 14 Harv. L. Rev. 186, 194-5; 24 Harv. L. Rev. 415, 437.

[39]One might as well say that, because the law treats certain defamatory words as actionable *per se*, it is therefore bound to so regard all defamatory charges. Or that, because the law allows an action for some consciously false statements, it must therefore allow an action for all lies.

[40]Pollock, Torts (6th ed.) 534, note *x*.

[41]Pollock, Torts (6th ed.) 591, 592 and 597, note *l*.

[42]Prof. Williston, 24 Harv. L. Rev. 436.

[43]See Lord Loreburn, in Jones *v.* Hulton L. R. [1910] App. Ca. 20, 23, 24. As to the rules applicable to statements which are not in their nature defamatory of reputation, and are likely to do harm to plaintiff only when communicated to abnormal persons; see Odgers, Libel and Slander (5th ed.) 107, 108, 75, 77, 78; Bower, Code, 443-445, 238; Salmond, Torts (1st ed.) § 149.

of Lords, in the leading case of *Derry* v. *Peek*,[44] that the plaintiff cannot recover for an honest, though negligent, misstatement.

On the other hand, there are three classes of cases where a plaintiff, in the event of an honest misstatement by defendant, is frequently allowed practically the same relief (a relief of equivalent pecuniary benefit), which he would have obtained if he had prevailed in an action for deceit. And this, too, in cases where no wrong intent is attributed to the defendant.

These classes of cases are:

1. Certain cases where the doctrines of estoppel *in pais* is applicable.
2. Certain actions professedly based upon a contract of warranty; but where the existence of such contract is a legal fiction.
3. Proceedings where plaintiff seeks rescission or restitution.[45]

Comparing *Derry* v. *Peek* with the three classes just described,

[44](1889) L. R. 14 App. Ca. 337.

[45]As to Class 1, see Prof. Williston, in 24 Harv. L. Rev. 415, 423-427; also Mr. Ewart in various passages scattered through Chapters XV and XVI of his work on Estoppel by Misrepresentation. See especially p. 187-191; 222-224; 226-227; 229-232, 236. See also Perley, *C. J.*, in Horn *v.* Cole (1868) 51 N. H. 287, 297. Both Prof. Williston and Mr. Ewart criticise the statement made by Lindley, *L. J.*, and Bowen, *L. J.*, in Low *v.* Bouverie L. R. [1891] 3 Chan. 82, 101, 105; (in substance) that estoppel is only a rule of evidence and not a cause of action.

As to Class 2, see full discussion by Prof. Williston, in 24 Harv. L. Rev. 415, 417-423; and see comments in 27 Law Q. Rev. 276.

The modern doctrine that an agent warrants his authority has been called by Sir Frederick Pollock, "one of the most brilliant and successful fictions of the Common Law." Pollock, Expansion of the Common Law, 136.

As to Class 3, Mr. Bower puts the matter thus, in his "Criticism of the Substance of the Law of Misrepresentation":

"The Common law rule to which exception is taken, on the ground of irrationality, is that which prescribes that, though rescission may be granted for any misrepresentation, whether innocent or fraudulent, no action will lie for damages unless fraud is established. It is difficult to discover any good reason, theoretical or practical, for this distinction."

". . . . Rescission is one way of reducing the balance; compensation in money is another, and a less complete and satisfactory one. Both remedies are alike designed to put back the parties in *statu quo*,—specifically and exactly, in the one case; generally, and so far as money can do it, in the other. If an innocent misrepresentation entitled the representee to rescission, or the undoing of the past, which is the ideal remedy, why should it not *a fortiori* entitle him, at his option, to the less satisfactory and perfect remedy of recompensing him for the past?" Bower, Actionable Misrepresentation § 472.

Compare Ewart, Estoppel, 222, 223, 225, 232. But see Prof. Williston, 24 Harv. L. Rev. 415, 427.

we have, at first sight, what might be called a "competition of opposite analogies." *Derry* v. *Peek* would tend against imposing absolute liability upon a stranger, who disparages title to property in the belief that his statement is true; while the other three classes of cases tend to sustain such liability. The authority of *Derry* v. *Peek* is, however, materially impaired by the fact that its intrinsic correctness has been denied by eminent English legal writers,[46] and also by the fact that it is not followed in some parts of the United States.[47]

We have now been considering classes of cases where courts manifest a strong tendency to decide upon the liability of the publisher of an untrue statement, without regard to the question whether he was or was not negligent. Absolute liability or absolute exoneration, irrespective of care or negligence, would seem to be the order of the day. But there may be cases where liability for untrue statements depends upon the presence or absence of negligence. Under differing states of fact, the requisites to liability may differ widely.

Assume, as common features, that defendant has made a statement which was not true in fact, and that damage has thereby been caused to plaintiff.

In one class of cases, a defendant may be exonerated, unless he consciously falsified.

In a second class, a defendant, although honestly believing his statement, may be held liable if he were negligent.[48]

In still a third class, a defendant may be held liable, even though both honest and non-negligent.

I believe that actions for defamation of reputation and actions against strangers for disparaging the title to property should both

[46]Pollock, Law of Fraud in British India, 54-56, 93, 94; Bower, Actionable Misrepresentation, 400, 402.

[47]See 24 Harv. L. Rev. 415, 428, 429. It may be noticed, in passing, that the best recent English authorities, including those who believe Derry *v.* Peek intrinsically wrong, understand that Derry *v.* Peek not only settled that an action for deceit cannot be based on a merely negligent representation, but also that no action whatever will lie for a negligent misrepresentation. For a criticism of this view of the effect of Derry *v.* Peek see 14 Harv. L. Rev. 184, 185-186.

[48]In 14 Harv. L. Rev. 184, 188, 195-196, it is contended that cases like Derry *v.* Peek properly fall under the second class, and that although an action for deceit was not sustainable, yet an action for negligence ought to be allowed. For some objections to this view and for a suggestion of some practical difficulties in its application, see Prof. Williston, 24 Harv. L. Rev. 415, 436, 437.

be placed in the third class. Absolute liability should ordinarily be imposed, even upon honest and non-negligent defendants.[49]

So far as to the liability of a stranger.

Now as to the liability of a Rival Claimant.

Three "common" propositions have already been stated; all of which are requisite to maintaining an action against either a stranger or a rival claimant; *viz.*, publication, statement not true in fact and resulting damage. What, if any, additional propositions must be proved in order to make out a *prima facie* case against a rival claimant?[50]

First: If there is a controversy as to the character in which the defendant purported to be acting when making the statement, and the plaintiff seeks to have him subjected to the stringent liability imposed upon strangers (thus depriving him of the special protection afforded to rival claimants), the burden is upon the plaintiff to prove that the defendant when making the statement did not profess to be asserting a claim on his own behalf (or on that of his principal).

Next: If it is to be taken (either as admitted or proved) that the defendant when making the statement *did* profess to be asserting a claim on his own behalf (or on that of his principal), then the plaintiff must, in addition to the three "common" propositions, prove one of two things:[51]

Either (1): That defendant did not believe in the truth of his statement.

More specifically: That defendant did not believe in the validity of the claim which he set up; did not believe in the validity of the title in himself which he asserted.[52]

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[49]Here, perhaps, we may be met by an argument based upon an analogy, sought to be drawn from the rule as to non-liability for physical damage, when occasioned by the non-negligent use of physical objects in carrying on certain common and beneficial occupations. In 60 Univ. of Pa. L. Rev. 461, 471-2, I have argued that the grounds of this rule do not apply to cases of defamation; and for similar reasons, I think that they do not apply to disparagement of title by a stranger.

[50]In what follows, it is assumed that the defendant's statement did not contain matter in excess of what was reasonably necessary to protect the defendant's supposed interest, or to give reasonable warning to the public. If it did, it would not be immune even though made in good faith. See 25 Am. & Eng. Ency. Law (2nd ed.) 1082.

[51]So, too, if defendant claims to be *prima facie* exonerated on the ground that the making of the statement was a reasonable method of protecting the interests of the addressee, the *prima facie* immunity would be destroyed by proving either of the propositions about to be stated in the text; *viz.*, want of belief, or wrong motive on the part of the defendant.

[52]The words, "did not believe in the truth of his statement," are wide enough to include cases where defendant knew that his statement was un-

Or (2): That the defendant, even though believing in the validity of his claim was, in making it, actuated by a wrong motive.

More specifically: That defendant was actuated by some motive other than that of protecting his own interest, or, perhaps, of giving reasonable warning to persons liable to purchase of the plaintiff.[53]

The law as above stated, relative to special protection afforded the rival claimants, is in one respect different from, and is in another respect similar to, the law of conditional privilege in actions for defamation of reputation.[54]

In defamation, the burden is on the defendant to prove that the occasion was privileged, (*i. e., prima facie,* or conditionally, privileged). But in actions for disparagement of property, the burden is practically upon the plaintiff to prove that the occasion was *not prima facie* privileged.[55] This is one of several illustrations of the judicial desire to make it more difficult to maintain an action for

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true and where defendant made the statement recklessly, not knowing or caring whether it was true or untrue. See Lord Herschell, in Derry *v.* Peek (1889) L. R. 14 App. Ca. 337, 374.

[53]It has been supposed that, by the early common law, one who asserted a claim in his own behalf was absolutely privileged; and that was not liable upon proof of wrong motive, or even upon proof of his non-belief in the claim asserted. See Townshend, Slander and Libel (4th ed.) § 206*b*; 25 Am. & Eng. Ency. Law (2d ed.) 1082. But this view certainly is not held by the courts of the present day. In Linville *v.* Rhoades (1898) 73 Mo. App. 217, the defendant requested an instruction, in substance, that defendant "asserting title in himself" was not liable. Ellison *J.*, said (p. 222) "the instruction was faulty in omitting any hypothesis of good faith in defendant in making claim in himself."

It is, of course, possible to-day for the disparaging statement to be made under such special circumstances that it will be absolutely privileged; *e. g.* when it is in the shape of a relevant allegation in a declaration or plea. In Maginn *v.* Schmick (1907) 127 Mo. App. 411, plaintiff filed a petition to quiet title. Defendant filed a cross action or counter-claim to recover for libel of defendant's title; the libel being averred to consist of the allegations in plaintiff's petition. Held, that plaintiff's allegations were absolutely privileged, and could not constitute actionable libel of defendant's title.

[54]The terms "privileged communication" and "privileged occasion" have been used by some jurists in discussing the law relative to disparagement of property. See Blackburn, *J.*, in Wren *v.* Weild (1869) L. R. 4 Q. B. 730, 737; Coleridge, *C. J.*, in Halsey *v.* Brotherhood (1881) L. R. 19 Ch. Div. 386, 388; Burdick, Torts (2d ed.) 382; 25 Am. & Eng. Encycl. Law (2d ed.) 1080. But compare Clerk & Lindsell, Torts (2d ed.) 548.

[55]An English statute establishes an exceptional rule in one class of cases; *viz:* "where any person claiming to be the patentee of an invention, by circulars, advertisements, or otherwise, threatens any other person with any legal proceedings or liability in respect of any alleged infringement of the patent . . ." In an action against the publisher of the threat, the defendant cannot set up the defence that he acted *bona fide,* or on a privileged occasion. He is liable unless the acts of which he complained in such threats were in fact an infringement of his patent; or unless he "with due diligence commences and prosecutes an action for infringement of his patent." Statute 7 Edw. VII., c. 29 § 36; re-enacting Statute 46 & 47 Vict. c. 57 § 32.

disparagement of property than an action for defamation of character. Personal reputation is protected against impairment by language more effectually than interests in property are protected against impairment by such method.[56]

If, however, the occasion is such as to give rise to *prima facie*, or conditional, privilege, then, both alike in actions for defamation and in actions for disparagement of property, the burden is upon the plaintiff to rebut or destroy the privilege. And as to the methods of rebuttal, to be more fully dealt with later, there is considerable similarity between the two actions.

Why allow to a rival claimant this protection in case of honest belief in his claim and freedom from wrong motive? A stranger, although honestly believing in his statement and free from any affirmative wrong motive, is liable. Why not a similar result in the case of a rival claimant?[57] The principle is the same as that which, in the law of defamation, is applied to a statement which was reasonably necessary to the defence of the speaker's self-interest. If the law were held otherwise as to disparagement, the owner of property might often be placed in a very troublesome dilemma. Suppose that a person believes that he has a claim to property which is being offered for sale by another party to third persons; and suppose that, in order to prevent their purchasing, he in good faith discloses his claim.

"In such case he does nothing more than it is his right and duty to proposed purchasers to do, if he would protect his claim. His silence on such an occasion, and his omission to give warning, would operate to estop him to assert the right which he believes he has to the property. The law does not require parties to forbear asserting their claim at the peril of an action for slander. Nor does it place a party who acts in good faith, in the alternative of being estopped, by neglecting to give notice, if he is silent, or of being liable to damages, if he speaks and his claim proves to be invalid."[58]

For the reasons which lead to the enactment of this statute see Lindley, *L. J.*, and Bowen, *L. J.*, in Skinner *v.* Shew L. R. [1893] 1 Ch. 413, 420, 423.

For the construction of the statute, see Odgers, Libel and Slander (5th ed.) 98-105.

[56]So tangible objects of property are protected against physical invasion more effectually than the ownership of such objects is protected against language impugning the title of the owner.

[57]"Because he would be acting upon his rights in putting forward his own case." Bowen *L. J.*, in Skinner *v.* Shew L. R. [1893] 1 Ch. 413, 423,

[58]Woodruff, *J.*, in Like *v.* McKinstry (1868) 3 Abbott New York Court of Appeals Decisions 62, 66-67; *s. c.* 4 Keyes 397, 410. Compare Cardon *v.* McConnell (1897) 120 N. C. 461, 463; and see Johnson, *J.*, in Hovey *v.* Rubber Tip Pencil Co. (1874) 57 N. Y. 119, 126.

Even if the facts were not such that silence would actually give rise to estoppel, yet the failure to make his claim known would often, in subsequent litigation over the title, be a circumstance to be weighed by the jury against one who was a rightful claimant.

It is enough if the defendant rival claimant actually believed in the validity of the title which he asserted. It is not requisite to his protection that there should have been reasonable ground for his belief. The fact that it was unreasonable to entertain the belief is, of course, a circumstance to be weighed by the jury in determining whether the defendant did actually believe. From such unreasonableness the jury *may* infer that the defendant did not believe; but they are not *bound* to draw such an inference. Unreasonableness of belief is not a legal test of non-belief.

The foregoing doctrine is sustained by an overwhelming weight of authority. The leading English case is *Pitt* v. *Donovan*, decided in 1813.[59]

There are occasional judicial opinions where unreasonableness of belief is spoken of as if it furnished a legal test of non-belief. Probably the decision in most of these cases could well have been rested on the ground, that there was no evidence upon which a jury could properly find that the defendant did honestly believe in the validity of the title which he asserted.[60]

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[59] In Pitt *v.* Donovan (1813) 1 M. & S. 639, the trial judge charged that the existence of malice on the part of defendant would depend "not on the circumstance whether he believed it to be true, but whether his belief was such as a man of sound mind, or a man of sense and knowledge of business, would have formed." This instruction was held erroneous. Lord Ellenborough, *C. J.* (p. 645) said: ". . . if what the defendant has written be most untrue, but nevertheless he believed it, if he was acting under the most vicious" (erroneous) "of judgments, yet if he exercised that judgment *bona fide*, it would be a justification in this case." The question might have been left to the jury—"not if you think that no man of a rational understanding would come to such a conclusion, but you will say whether you think this defendant, with such an understanding as he possesses, did *bona fide* arrive at the conclusion which he has stated . . ." So Mr. Bower says: "It is also quite immaterial whether the defendant believed in the validity and existence of his title on rational or irrational grounds . . . if he did *in fact* so believe, and if the suggested stupidity was not so inconceivable as to compel the inference that it was not a case of stupidity at all, but of malevolence . . ." Bower, Code, 247 note (*f*). See *Contra* Townshend, Slander and Libel (4th ed.) § 204.

[60] If we look to the analogy of actions for defamation of reputation, the authorities are not so unanimous in regard to the non-essentiality of reasonableness of belief on a question of privilege, as they are in actions against a rival claimant for disparagement of property.

In England, Clark *v.* Molyneux (1877) L. R. 3 Q. B. Div. 237, holds that, in an action for defamation, a *prima facie* privilege is not destroyed by the mere fact that defendant had no reasonable ground for believing in his statement. If he actually did believe, that is enough to entitle him to receive protection.

We have stated *ante* two alternative propositions, one or the other of which must be proved in order to hold a rival claimant. (In brief: either that defendant did not believe in his own statement; or that he was actuated by a wrong motive). There are other and more common forms of stating the essentials to the liability of a rival claimant. What are the reasons for discarding these common forms and for adopting those here substituted?

Both our propositions might be, and sometimes are, condensed into one, by saying that plaintiff must prove that the statement "was not made on a lawful occasion." But this necessitates an explanation of the phrase "lawful occasion," and that explanation would consist in stating the two above propositions.[61]

A popular mode of statement is to say that plaintiff must prove "bad faith." That term could probably be so interpreted as to cover the meaning of the above propositions; but specific statements seem preferable to general expressions.

A still more popular form of statement has been borrowed from the law of defamation; where it has frequently been said that a plaintiff, in order to rebut the defense of conditional privilege must prove "malice" in the defendant. In like manner, it is often said that "malice" must be shown, in order to impose liability for disparagement of title upon a defendant who professed to be asserting a claim of his own. And it is sometimes assumed that no fact is of any materiality in this connection except so far as it constitutes evidence upon which the existence of "malice" may be found. It is apparently taken for granted that malice is the sole ground of liability, and that everything else is material only so far as it constitutes evidence tending to establish, or negative, malice.

Now malice is an ambiguous, and often misleading term. Sir Frederick Pollock wisely said that "the less we have to do with it the better."[62] It is preferable "to drop the word 'malice' alto-

But in the United States, there is a conflict among the decisions in defamation cases on this point. According to Carpenter *v.* Bailey (1873) 53 N. H. 590, the alleged *prima facie* privilege does not exist if the defendant, although honestly believing his statement, had no reasonable ground for such belief. This view is supported by Toothaker *v.* Conant (1898) 91 Me. 438; Briggs *v.* Garrett (1886) 111 Pa. State, 404, 414; and Conroy *v.* Pittsburgh Times (1891) 139 Pa. State 334. The contrary view is sustained by Barry *v.* McCollom (1908) 81 Conn. 293; Bays *v.* Hunt (1882) 60 Ia. 251, 255; Hemmens *v.* Nelson (1893) 138 N. Y. 517, 524; and Haft *v.* First National Bank (N. Y. 1897) 19 App. Div. 423, 425-6.

[61]Compare Bower, Code, 246, note (*f*).

[62]Pollock, Torts (6th ed.) 272.

gether and to substitute for it the meaning which is really intended to be conveyed by it."[63]

Here we have stated two alternative grounds of liability. Either of these standing alone is sufficient, without aid from the other. In defamation, the fact that defendant did not believe his statement, is sometimes spoken of as if it were important only as furnishing evidence of malice, and not as constituting in itself a substantive and sufficient ground of rebutting a *prima facie* protection. But we think that want of belief constitutes *per se* a distinct and self-sufficient ground for rebutting conditional privilege in defamation, or for imposing liability in an action for disparagement upon one who professes to be asserting a claim of his own.[64] No doubt if the jury found want of belief, they would generally find wrong motive also.[65] But a finding of non-belief is enough to decide the case without aid from an additional finding of wrong motive.[66] And the question of belief is really the point on which the decision turns in a vast majority of cases.[67] If the defendant did not believe his statement, it is extremely improbable that he was actuated by a good motive in making it. But even if he were so actuated, the good motive would not relieve him from obligation to make compensation for damage caused by his lie.

Why, then, enumerate wrong motive as an alternative ground of liability? True, the defendant, if he did not believe his own statement, would be liable irrespective of motive. But it is possible (although it may happen only seldom) that a defendant, even though believing in the claim which he mistakenly asserted, was not actuated by the motive of protecting his own interest

[63]Lord Lindley, in South Wales Miners' Federation *v.* Glamorgan Coal Co. L. R. [1905] App. Ca. 239, 255. Compare Prof. Ames, 18 Harv. L. Rev. 411, 422.

[64]"What is required in the name of malice in the law of slander of title is satisfied by proof of what is called fraud, in the narrower sense, in the law of deceit, to wit, knowledge of falsity, or falsity with recklessness of consequences." Bigelow, Torts (7th ed.) 89.

[65]"It is obvious that, if the statement is wilfully false, it must be malicious, whatever meaning we attach to that ambiguous term . . ." Salmond, Torts (1st ed.) 429. ". . . in all the authorities cited, there is not a single one in which the existence of malice does not seem to be derived from some falsity connected with the assertion." Van Brunt, *P. J.*, in Cornwell *v.* Parke (N. Y. 1889) 52 Hun 596, 599.

[66]Of course, no question arises as to either belief or motive, unless the plaintiff has first proved that the statement was not true in fact.

[67]"Belief *in fact* in the genuineness and honesty of the claim put forward is the test most commonly applied." Bower, 247, note (*f*).

or of giving reasonable warning to intending purchasers.[68] His dominating intent may have been to harm plaintiff, and his controlling motive may have been hostility to plaintiff. If so, he would be liable.[69]

If, however, the sole motive of a defendant, who believed his statement, was to protect his own interest, then he is not liable merely because he foresaw that damage to the plaintiff was likely to be an incidental result of his thus protecting himself.[70]

If we examine the actual decisions respecting the liability of one who professed to be a rival claimant, we shall find a substantial agreement that something more is required here than what is essential to the imposition of liability upon a mere stranger.

In describing the nature of these additional requirements, most judicial opinions employ some of the phrases which we have been criticising: *e. g.*, "malice," "bad faith," "knowledge of falsity *and* malice." They do not state, as all sufficient legal tests, the alternative propositions which we have substituted for the popular phrases. But, upon the actual facts, the decision in almost every case would have been the same if these alternative propositions had been applied as the sole legal tests. In other words, the result actually reached would not have been altered if the court had adopted our alternative propositions as the *rationes decidendi* in cases of this description, instead of giving their reasons in language which we deem infelicitous.[71]

(To be Concluded.)[72]

Jeremiah Smith.

Cambridge, Mass.

[68]As to what is a sufficient finding of wrong motive, see May *v.* Anderson (1895) 14 Ind. App. 251. Where a rival claimant publishes a notice not to purchase of plaintiff, it is error to charge that malice is presumed in law from the fact of publication. McDaniel *v.* Baca (1852) 2 Cal. 326. For a case where it was held that there was no evidence of malice, see Steward *v.* Young (1870) L. R. 5 C. P. 122.

[69]Query: Is a different view intended to be intimated in Bigelow on Torts (7th ed.) 87?

[70]See Pollock, Torts (6th ed.) 302; Parker, *J.*, in Lovell Co. *v.* Houghton (1889) 116 N. Y. 520, 528; Collins, *M. R.*, in Dunlop etc. Co. *v.* Maison Talbot (1904) 20 Times L. R. 579, 581.

[71]The use of the objectionable term "malice" is almost universal. See, for instance: Wren *v.* Weild (1869) L. R. 4 Q. B. 730; Blackburn, *J.*, 734; Halsey *v.* Brotherhood (1881) L. R. 19 Ch. Div. 386; Lord Coleridge, *C. J.*, 388; Baggallay, *L. J.*, 390; Royal Baking Powder Co. *v.* Wright (1901) 18 Pat. Ca. 95, Lord Davey, 99, Lord James, 101, Lord Robertson, 103; Dunlop &c. Co. *v.* Maison Talbot (1904) 20 Times L. R. 579; Collins, *M. R.* 580, 581.

[72]In the next number of this volume.